

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 CAMANO ACTION FOR A RURAL
3 ENVIRONMENT (CARE) AND WHIDBEY
4 ENVIRONMENTAL ACTION NETWORK
5 (WEAN),

6 Petitioners,

7
8 v.

9 ISLAND COUNTY,

10
11 Respondent.
12

Case No. 08-2-0026c

**ORDER ON MOTION FOR
RECONSIDERATION**

13 THIS Matter comes before the Western Washington Growth Management Hearings Board
14 upon a Motion for Reconsideration filed by Petitioner Whidbey Environmental Action
15 Network (WEAN) regarding the Board's November 17, 2008 Final Decision and Order
16 (FDO) in the above-captioned matter. This order denies WEAN's Motion for Reconsideration
17 except for correcting the clerical areas pointed to by WEAN.
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20 **PROCEDURAL HISTORY**

21 On November 17, 2008, the Western Washington Growth Management Hearings Board
22 (Board) issued its FDO. With this FDO, the Board found WEAN failed to demonstrate Island
23 County's new wetland protection measures did not comply with the Growth Management
24 Act (GMA), RCW 36.70A, except in relationship to reasonable use provisions, Rural
25 Stewardship Plans, and a 25 percent limitation on buffer expansion.
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27 Pursuant to WAC 242-02-832, WEAN filed a Motion for Reconsideration of the FDO.¹
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¹ WEAN Motion for Reconsideration, filed December 1, 2008.
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1 As provided by WAC 242-02-832(1), the Board also received a Reply to the Motion for
2 Reconsideration from Island County.²

3 4 **DISCUSSION**

5 A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832.
6 It provides, at WAC 242-02-832(2), that a motion for reconsideration must be based on at
7 least one of the following grounds:
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- 9 (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking
10 reconsideration;
11 (b) Irregularity in the hearing before the board by which such party was prevented from
12 having a fair hearing; or
13 (c) Clerical mistakes in the final decision and order.

14 Motions for Reconsideration will be denied when they present no new arguments that were
15 not previously considered in the original decision.³ WEAN bases its Motion for
16 Reconsideration on an alleged misinterpretation of fact or law (WAC 242-02-832(2)(a)) and
17 clerical mistakes (WAC 242-02-832(2)(b)). WEAN limits these errors to Issues 1, 8, 9, and
18 10.
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20 **A. Issue 1 – Landscape Approach to Critical Area Protection**

21 WEAN notes that within the FDO the Board concluded that because the County lacked the
22 necessary science to implement a landscape approach its decision not to adopt such an
23 approach was not clearly erroneous. WEAN points out that this conclusion was made
24 despite an acknowledgment by the Board that a landscape approach is the agreed upon
25 method for long-term protection of the functions and values of wetlands. WEAN contends
26 the Board's ruling amounts to a misinterpretation of law because it only addressed the first
27 GMA violation asserted – inclusion of BAS – and failed to address the second GMA
28 violation asserted – protection of wetlands. WEAN further argues that the Board's ruling
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32 ² Island County's Reply to WEAN's Motion for Reconsideration, filed on December 8, 2008.

³ *CCNRC v. Clark County*, WWGMHB No. 96-2-0017 (Order on Reconsideration, Jan. 21, 1998)

1 creates a “catch-22” in that to ensure compliance would require better science and there is
2 no requirement to develop or implement this science.

3
4 In response, the County asserts WEAN offers no new legal argument to support its
5 contention that wetland regulations should be based on a landscape approach rather than a
6 site-based approach nor does WEAN provide an explanation of how the Board
7 misinterpreted the law, especially given *Wetlands in Washington Volume 1* and *Volume 2’s*
8 science and recommendations.⁴ The County further notes that its wetland protection
9 program does consider landscape factors but that a landscape approach is neither practical
10 nor supported by Washington law.⁵

12 **Board Discussion**

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14 In its original briefing, WEAN set forth the following argument:

15 The science is clear and overwhelming that relying primarily only on buffers
16 and individual protection of individual wetlands will not prevent degradation of
17 numerous wetland functions in the face of widespread changes in the
18 landscape, especially deforestation and addition of impervious surface. For
19 this reason, the Board should find that the County has failed to comply with the
20 GMA by failing to take a landscape approach to wetland protection, and
 remand the matter for correction.⁶

21 With this argument, WEAN contended the County’s “site-scale” wetland program did not
22 address cumulative changes in the larger landscape, particularly through deforestation and
23 impervious coverage, and resulted in degradation to wetland habitat and hydrological
24 functions.

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26 On reconsideration, WEAN contends the Board ruled only on whether Island County
27 complied with the GMA’s requirement to include BAS and not whether the County is failing
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31 ⁴ County Response, at 2.

32 ⁵ County Response, at 2-3 (citing to *Citizens Alliance for Property Rights, et al v. Ron Sims*, 145 Wn. App. 649 (2008)).

⁶ WEAN HOM Opening Brief, at 7.

1 to protect its wetlands. The Board sees the key to this issue in the GMA's requirement to
2 use the Best Available Science (BAS), with the adjective "available" generally meaning to be
3 present or ready for immediate use. Therefore, the word "available" would be pointless if
4 construed to mean science that is expected to be available at some future date, especially
5 given the GMA's requirement to include BAS - as how can the County include that which
6 does not exist?
7

8 In the FDO, the Board recognized that the science in the Record noted that the performance
9 of wetland functions is controlled by a number of environmental factors within the wetland
10 boundary (site scale) as well as in the broader landscape (landscape scale) and that
11 wetlands do not function in isolation, but rather a wetland's ability to provide certain
12 functions is influenced by the conditions and land uses within their contributing basins.⁷
13 However, the Board noted that the data needed to develop a comprehensive, landscaped-
14 based approach within Island County was not available at this point in time.
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17 With *Volume 2* of its wetlands guidance, Ecology presents a four-step framework that
18 integrates scientific information about the landscape (landscape analysis), planning
19 approaches, and regulatory and non-regulatory actions at the different geographic scales at
20 which natural resources should be managed. According to Ecology, a detailed landscape
21 analysis is the first step in determining precisely how landscape scale processes may affect
22 wetland functions, the extent of any such effects, their causes, and the appropriate
23 measures to address them.⁸ Although Ecology has provided several general approaches
24 that may be used to address ecological processes at the landscape scale, Ecology itself has
25 not yet perfected a method for landscape analysis and no specific recommendations have
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30 ⁷ *Volume 1*, at 2-1 and 7-1

31 ⁸ See generally *Volume 2* which provides for a 4-step framework to protect wetlands, with Step 1 being
32 conducting a landscape analysis and Step 2 developing regulatory and non-regulatory methods to reduce risks.

1 been made.⁹ In other words, although the science may suggest utilizing a landscape
2 approach, there is no science in the record for implementing such an approach.

3
4 As noted in the FDO, Island County is utilizing a site-based approach to wetland protection.
5 Ecology recommended this approach to protect wetlands and defends it as an approach
6 that will protect wetlands which is supported by currently available scientific information and
7 methods. Island County's selection of a site-based approach with prescriptive buffers based
8 on wetland category as well as land use intensity that recognizes impervious and vegetation
9 coverage is not a clearly erroneous decision.
10

11 **Conclusion:** The Board finds no misinterpretation of law as the GMA requires the inclusion
12 of the Best Available Science which is science that is presently available as well as
13 practically and economically feasible so as to protect critical areas. The Board finds
14 reliance on prescriptive buffers which incorporate readily available science and is a method
15 supported by Ecology does not fail to protect the functions and values of wetlands. As
16 such, the Board properly applied the GMA's requirements. Therefore, WEAN's Motion for
17 Reconsideration in regards to Issue 1 is DENIED.
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20 **B. Issue 8 – Land Use Intensity and Critical Area Buffers**

21 WEAN contends the Board's rejection of its challenge based on five mitigating factors
22 misinterprets the facts of the case. WEAN asserts that these mitigating factors are
23 irrelevant in relationship to the "problematic nature" of exemptions to wetland buffers for
24 logging, clearing, and grading. In addition, WEAN argues the Board failed to recognize that
25 the key characteristic of the land use intensity classification and buffer system is that it
26 addresses use on the entire parcel and not just activities near wetlands.
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32 ⁹ Volume 2, at 1-4 (noting that Ecology's method(s) are under development, being improvement as applied to different jurisdictions, and lacks analysis as to wildlife/habitat corridors).

1 In response, the County asserts WEAN's contention that the factors cited by the Board are
2 irrelevant does not distort the Board's legal conclusion which found the County's land use
3 intensity system was not clearly erroneous.¹⁰ The County contends WEAN fails to explain
4 why, under the County's system, a new, more intense use on the same property would have
5 inadequate buffers given the case-by-case analysis utilized.¹¹ Lastly, the County states new
6 uses will still be required to provide satisfactory buffers and that if a use cannot establish the
7 required buffer then it will not be approved.¹²
8

9 **Board Discussion**

10 WEAN bases its motion on the following statements contained within the FDO in response
11 to WEAN's concern that intensity on a lot could be increased after an appropriate buffer was
12 established by permitted forest practice activities or unpermitted clearing and grading
13 activities. In response to this concern, the Board stated:
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15 ...the Board acknowledges that this is problematic under the County's wetland
16 protection system. Several factors mitigate this concern.
17

18 ...the following factors sufficiently mitigate against the risk that buffers for
19 future development on a site cannot be adequately provided by the County's
20 approach: (1) County code provisions ICC 17.02.090D, ICC 17.02A.040A.1,
21 5, 6, and B.6, ICC 17.02A.090G.2, (2) the County's buffer determination
22 system compares favorably to Ecology's model program, (3) the County's
23 monitoring and adaptive management system, (4) permits are required for
24 road building that require the functions and values of wetlands be protected,
25 and (5) the County's past history of relatively little clearing and grading near
26 wetlands in the County.¹³
27

28 WEAN contends the Board has misinterpreted the facts of this matter specifically in regards
29 to the mitigating factors noted by the Board. In the original briefing, WEAN contended
30 certain exemptions allowed for land use intensity to increase when an activity occurs outside
31

32 ¹⁰ County Response, at 3.

¹¹ County Response, at 3-4.

¹² County Response, at 4.

¹³ Nov. 17, 2008 FDO, at 40, 42-43.

1 of a buffer, citing to ICC 17.02A.060A (Forest Practices) and ICC 11.02 (Clearing and
2 Grading). As with Issue 1, this issue rests on activities occurring outside of a wetland and
3 its buffer which may impact the functions and values of the wetland itself and rests on a
4 presumption of cumulative land use intensity.
5

6 Once a buffer has been established, a property owner may be allowed to conduct various
7 types of permitted activity on the land outside of the buffer area.¹⁴ The reasoning behind
8 this is that the purpose and intent of the buffer is to protect the functions and values of the
9 critical area. The various mitigating factors cited by the Board seek to address the
10 cumulative nature of activities occurring on land encumbered by critical areas and the
11 related risk of using this approach by requiring monitoring and annual review of land use
12 intensity. However, the County requires a new intensity determination for each new
13 development proposal so an appropriate buffer and/or other wetland protection measures
14 can be applied to protect the function and values of the wetland. What WEAN implies is that
15 the County will not implement its wetland protection measures to protect all wetland
16 functions and values. How the County enforces its critical areas ordinance is not an area
17 over which the Board has jurisdiction. The Board finds that the County's wetland protection
18 measures, when applied appropriately, will protect the County's wetlands. The Board finds
19 it has not misinterpreted fact or law regarding Issue 8.
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23 **Conclusion:** The Board finds no misinterpretation of fact in regards to Issue 8 and land use
24 intensity in relationship to the County's wetland program. Therefore, WEAN's Motion to
25 invalidate or remand Ordinance C-63-08 is DENIED.
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29 ¹⁴ Under Ecology's wetland buffer program, buffers can be based solely on wetland category; wetland category
30 and the intensity of the impacts from proposed land uses; or wetland category, intensity of impacts, and the
31 functions or special characteristics of the wetland. Island County's wetland buffer system is based on a
32 determination of land use intensity as well as the wetland's category and reflects both water quality and habitat
functions. Under the County's system, a wetland buffer can be as small as 15 feet or as large as 300 feet.

See ICC 17.02A.090F.1.a.

1 **C. Issue 9 – Mature Forested Wetlands**

2 **1. Pantier Thesis**

3 WEAN argues the Board erred when it did not conclude the research study relied on in its
4 original briefing, *Growth Rates and the Definition of Old-Growth in Forested Wetlands of the*
5 *Puget Sound Region* by Luke Pantier (Pantier Thesis) was BAS. WEAN submits two
6 declarations to establish that the thesis is a “full-fledged scientific study that underwent
7 intense review and meets all requirements in rule as BAS.”¹⁵ To cure this error, WEAN
8 requests the Board delete footnote 111 from the FDO which addressed the eligibility of the
9 Pantier Thesis for BAS.¹⁶
10

11
12 In response, the County contends WEAN failed to file a motion to supplement the Record
13 with the declarations and that they go beyond WEAN’s claims by offering opinion on the
14 merits and conclusions of the case.¹⁷ The County seeks to strike these declarations in their
15 entirety or, in the alternative, to limit their use to providing evidence that the Pantier Thesis
16 was peer reviewed.¹⁸
17

18 **Board Discussion**

19 The first issue for the Board to address is whether or not the Declaration of Dr. Cooke and
20 the Declaration of Mr. Pantier should be admitted to the Record of these proceedings and
21 considered in relationship to WEAN’s Motion. As a frequent petitioner before this Board,
22 WEAN is well aware that the Board’s review of a matter is limited to the Record that was
23 before the County when taking the challenged action and to any supplemental evidence the
24 Board has previously determined would be necessary or of substantial assistance.¹⁹
25 Supplemental post-hearing evidence is not accepted unless the Board has specifically
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30 ¹⁵ WEAN Motion, at 5. Attached to WEAN’s Motion was the Declaration of Dr. Sarah Spear Cooke and the Declaration of Luke Pantier.

31 ¹⁶ WEAN Motion, at 6.

32 ¹⁷ County Response, at 1-2.

¹⁸ County’s Response, at 2.

¹⁹ RCW 36.70A.290(4); WAC 242-02-540.
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1 authorized it.²⁰ In addition, the Board does not permit evidence which was readily available
2 prior to the Hearing on the Merits (HOM) but was inadvertently omitted or simply not
3 presented by a party.²¹ The time to present evidentiary support comes prior to the HOM
4 and not after.

5
6 WEAN contends it did not previously submit evidence establishing the review process the
7 Pantier Thesis underwent because it assumed that it was common knowledge a scientific
8 thesis underwent such a review.²² However, as noted by the County, the two declarations
9 submitted by WEAN do more than merely set forth the peer review process of the Pantier
10 Thesis. These declarations also seek to provide analysis and interpretation as to the
11 findings and conclusions set forth in the Pantier Thesis and the FDO. In this regard, these
12 declarations are the very type of post-hearing evidence that is precluded by Board rule,
13 court rule, and case law as this information was readily available to WEAN prior to the HOM.
14 Therefore, the Declaration of Dr. Cooke and the Declaration of Mr. Pantier will be admitted
15 to the Record of this proceeding for the sole and limited purpose of demonstrating the peer
16 review process. All other information presented within these declarations will not be
17 considered by the Board.
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21 The next question then becomes whether the Board erred, as WEAN asserts, when it stated
22 that research documents, such as the Pantier Thesis, needed to satisfy all of the criteria
23 provided in WAC 365-195-906 and "what appears to be missing from WEAN's document is
24 peer review."²³ Although the Board acknowledges it questioned whether a graduate-level
25 thesis should be considered BAS, it notes that it never explicitly stated that the Pantier
26 Thesis was not BAS and, in fact, the Board reviewed and utilized the information presented
27 in the Pantier Thesis in comparison to the County's definitional criteria for MF wetlands in
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30 ²⁰ WAC 242-02-810.

31 ²¹ *Holaday v. Merceri*, 49 Wn. App. 321, 329-330 (1987)(Citing *State v. Evans*, 45 Wn. App. 611, 613 (1986)
and *State v. Fellers*, 37 Wn. App. 613, 617 (1984)). See Also, Washington Court Rule 59(a)(4).

32 ²² WEAN Motion, at 5.

²³ November 17, 2008, FDO, Fn. 111 at 46.

1 addition to Ecology's definitional criteria. Thus, the Board gave due consideration to the
2 scientific analysis set forth in the Pantier Thesis in comparison to other science contained
3 within the Record.
4

5 **Conclusion:** The Board recognizes that a graduate-level research study, such as the
6 Pantier Thesis, may satisfy WAC 365-195-906's criteria for a valid scientific process.
7 However, parties should not take for granted that any document will be automatically
8 considered BAS under the GMA just because it is scientific in nature. Petitioners asserting
9 that a jurisdiction has failed to utilize BAS and are countering the jurisdiction's actions with a
10 competing document must ensure that the document conforms to the WAC criteria for BAS
11 so that it will be properly considered by the Board. In this situation, although the Board
12 questioned whether the Pantier Thesis should be considered BAS, the information
13 presented within the document was considered by the Board when rendering its decision.
14 As such, WEAN's request to delete Footnote 111 from the FDO is denied but is clarified with
15 this Order on Reconsideration.
16
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18 **2. Mature Forested Wetlands**

19 On reconsideration, the key contention for WEAN in regards to Issue 9 is the classification
20 of Mature Forested Wetlands (MF Wetlands) based on tree diameter. WEAN contends the
21 Board made two misinterpretations of fact when it concluded that an "average 18 inch
22 diameter value is sufficient to adequately identify and designate this rare type of wetland."²⁴
23 WEAN first contends that the County's definition uses "average" diameter as the "minimum"
24 size for classification and that this fails to capture those MF Wetlands where the tree size is
25 below the average but still meet minimum age criteria. Secondly, WEAN argues that the
26 "average diameter [of 18 inches] used is for five species" and this does not apply to other
27 types of MF Wetlands that are typically smaller.
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²⁴ WEAN Motion, at 5 (Emphasis in original)
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1 In response, the County points out that it selected a tree diameter three inches smaller than
2 the diameter recommended by Ecology and its code provisions incorporate age as well.²⁵
3 The County notes its selected tree diameter of 18 inches is within the range of science and
4 that Island County has no known MF Wetlands, including those types described by the
5 Pantier Thesis.²⁶
6

7 **Board Discussion**

8 As noted in the Board's FDO, Island County has defined a MF Wetland as being a wetland
9 in which the tree canopy is comprised predominantly of trees having diameters of 18 inches
10 or larger or the oldest trees are 80-200 years old.²⁷ Several scientific documents were
11 relied on, with the Pantier Thesis being one piece of the scientific evidence. In addition to
12 the findings and conclusions made within the Pantier Thesis, the Board reviewed Ecology's
13 *Wetland Rating System* and *Wetlands in Washington Volume 2*, both of which established
14 an average diameter of 21 inches for mature forests which is based on upland forests but
15 recognizes that mature trees within wetlands are smaller and therefore this is reflected in
16 Ecology's rating system.²⁸
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19 WEAN wants the Board to ignore all other numbers in favor of the numbers presented in the
20 Pantier Thesis. In other words, WEAN requests that the Board grant the Pantier Thesis the
21 status of BEST available science and argues that Island County was required to use the
22 results of that research when developing its definitional criteria for MF wetlands. RCW
23 36.70A.172 requires Island County to include and consider BAS when developing critical
24 area regulations. In doing so, the County is permitted to not adopt WEAN's scientific
25 recommendations and resources in favor of other valid scientific information. In fact, this is
26 the discretion the Legislature has granted the County and to which the Board is directed to
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31 ²⁵ County Response, at 4.

32 ²⁶ County Response, at 4-5.

²⁷ See, Nov. 17, 2008 FDO, at 44 (citing ICC 17.02A.030).

²⁸ See, Nov. 17, 2008 FDO, at 44-45

1 defer.²⁹ It is not for the Board to decide what is the BEST science or to displace the
2 County's judgment about which science to rely upon with its own.³⁰

3
4 Although the Pantier Thesis concluded that the Ecology accepted size criteria of 21 inches
5 was significantly larger than the average size of trees in MF Wetlands of 80-200 years of
6 age, with sphagnum bogs an "extreme example"³¹ and Coast pine being a "special case,"
7 the Pantier Thesis also noted that averaging the size of dominant wetland species –
8 Western Red Cedar, Sitka Spruce, and Western Hemlock – would result in an 18 inch
9 minimum average diameter which would "probably be a good indication of what to expect" in
10 a common Puget Sound lowlands forested wetland. The Pantier Thesis further notes that
11 in order to incorporate mature forest stands in less-productive wetlands, a minimum average
12 size of 15 inches would be small enough to include most of the MF Wetlands likely to be
13 found in the Puget Lowlands and would allow for the identification and protection of more
14 stands including those that may not be 80 years of age.
15
16

17 Therefore, Island County had before it a range of science with Ecology's Wetland Rating
18 System and Wetland Recommendations reflecting an average diameter of 21 inches and
19 the Pantier Thesis setting a minimum average diameter of 18 inches but which noted that to
20 include most of the Puget Lowlands MF Wetlands a minimum average diameter of 15
21 inches should be utilized. The result – a varying average diameter range of 15 to 21 inches
22 - from which Island County selected 18 inches, a measurement well within the range of the
23 science presented to it and, as was noted in the FDO, a measurement supported by the
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28 ²⁹ RCW 36.70A.3201; *HEAL v. WWGMHB*, 96 Wn. App. 522, 532 (1999)(the Legislature left the cities and
29 counties with the authority and obligation to take scientific evidence and to balance that evidence among the
30 many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation
31 and surmise).

32 ³⁰ *HEAL*, 96 Wn. App. at 531.

³¹ Under Ecology's rating system, forested sphagnum bogs are rated as Category I, regardless of the age of
the forest therefore, the mature forest size criterion is more consequential for minerotrophic forested wetlands
than for sphagnum bogs. Pantier Thesis, at 16.

1 Pantier Thesis. Therefore, the Board finds no misinterpretation of fact in the County's
2 selection of 18 inches as a diameter to be utilized when classifying MF wetlands.

3
4 WEAN asserts that the County is utilizing this *average* as the *minimum* and, therefore fails
5 to capture trees below this size even if they meet age criteria. ICC 17.02A.300 requires
6 that a MF Wetland be comprised *predominantly* of trees having diameters of 18 inches or
7 larger. It does not require that all trees must satisfy this measurement before a wetland
8 qualifies as a MF Wetland. Thus, because Island County utilizes the word "predominantly"
9 which generally reflects something that is most common or frequent, the County provides for
10 a review of the actual structure of the wetland that encompasses trees of diverse sizes and
11 ages while recognizing that larger, older, more mature trees must be the most common. As
12 such, the Board finds no misinterpretation of fact in regards to the County's definition of MF
13 wetlands.
14

15
16 WEAN further asserts that the 18 inch diameter doesn't apply to all MF Wetlands. But as
17 noted above, the science is varied and even the Pantier Thesis relates the 15 inch
18 measurement on a single example, the Snohomish River estuary, and contends a
19 measurement smaller than 18 inches may be required in order to incorporate two other
20 extreme examples – wetlands dominated by Coast pine and sphagnum bogs. Since under
21 Ecology's rating system, forested sphagnum bogs are rated as Category I and priority
22 habitat, regardless of the age or size of the forest, the mature forest size criterion does not
23 impact these types of wetlands.³² This leaves the potential for wetlands comprised of
24 Coast pine to potentially be overlooked due to size. However, ICC 17.02A.030 permits
25 classification based on age as well as size and if it is common scientific knowledge that
26 "even very old coast pine are unlikely to reach 21 inches in size, and wetlands dominated by
27 coast pine are usually sphagnum bogs,"³³ then not only can the age criteria of ICC
28 17.02A.030 identify and protect Coast pine wetlands but also the sphagnum nature of these
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32 ³² Pantier Thesis, at 16.

³³ Pantier Thesis, at 45.

1 wetlands would designate them as priority habitat Category I wetlands. Therefore, as with
2 the other aspects of the County's definition for MF Wetlands, the Board finds no
3 misinterpretation of fact.
4

5 **Conclusion:** The GMA does not mandate that Island County adopt any specific scientific
6 analysis or recommendation; rather the GMA requires that Island County consider the
7 science. If the County's selection falls within the range of the BAS it considered, the Board
8 will not displace the County's judgment with its own. It is only when the County has
9 deviated from BAS that it must articulate the basis for this deviation. From the Record
10 presented to the Board, Island County did not deviate from BAS.
11

12 Therefore, the Board finds and concludes that WEAN, upon reconsideration, failed to
13 demonstrate that the Board misinterpreted the facts in regards to the diameter
14 measurement utilized when defining MF wetlands or that the County failed to include BAS in
15 making its selection as an 18 inch diameter, which is within the range of BAS present in the
16 Record for this matter.
17

18 19 **D. Issue 10 – Critical Area Buffers**

20 **1. Clerical Errors**

21 WEAN cites three places within the Board's FDO where it contends the Board made clerical
22 errors.
23

24 First, WEAN points to a portion of the FDO where the Board was articulating the arguments
25 presented by WEAN in its Reply Brief. In this section, the Board stated:³⁴
26

27
28 WEAN disputes the County's claim that its regulations allow buffers for mature
29 forested wetlands to be increased by referencing Exhibit R-9789, and argues it
30 is impossible to tell from this exhibit which wetlands are mature forested
31 wetlands.
32

³⁴ Nov. 17, 2008 FDO, at 60 (Underline emphasis added to indicate WEAN's concern).

1 WEAN states that neither its argument nor Issue 10 was limited to mature *forested*
2 wetlands but incorporates all forested wetlands. WEAN requests that the adjective
3 “mature” be deleted to accurately reflect its argument.
4

5 Second, WEAN points to a section of the FDO where the Board was discussing WEAN’s
6 assertion as to the inadequacy of buffers to mitigate for pets, herbicides, and pesticides. In
7 this discussion, the Board stated:³⁵
8

9
10 While the County’s Ordinance as discussed *infra* does not provide for fencing,
11 the Board finds that not providing buffers and fencing to assure the protection
12 of the wetland habitat from household cats is not practical and not a clearly
13 erroneous violation of RCW 36.70A.172.

14 Lastly, WEAN notes a clerical error in a portion of the FDO when the Board references the
15 County’s wetland rating system. In this section of the Board’s discussion, the Board
16 states:³⁶

17 In the County’s rating system, all buffers that receive scores requiring a buffer
18 to protect habitat receive a buffer of at least 75 feet or as much as 300 feet, in
19 line with *Volume 2*’s observation that studies have shown buffers of at least 76
20 feet are needed to protect forested wetlands from blowdowns.

21 WEAN asserts that the Board inadvertently used the word “buffer” when, in fact, it was
22 addressing “wetlands.”
23

24 The County submitted no response as to the clerical errors alleged by WEAN.
25

26 **Board Discussion**

27 The Board reviewed the language of Issue 10 and the arguments submitted by WEAN and
28 finds that WEAN is correct in that this issue, although argument was presented as to mature
29 forested wetlands, was not limited to mature forested wetlands but was intended to
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32 ³⁵ Nov. 17, 2008 FDO, at 64 (Underline emphasis added to indicate WEAN’s concern).

³⁶ Nov. 17, 2008 FDO, at 67 (Underline emphasis to indicate WEAN’s concern).

1 incorporate all forested wetlands. As such, the use of the adjective mature was a clerical
2 error on the part of the Board.

3
4 As to WEAN's second claim of clerical error, the Board agrees that this sentence is not a
5 model of clarity. As noted by WEAN, the use of the negative adverb "not" was erroneous.

6
7 Lastly, as to WEAN's third assertion of clerical error. WEAN is correct in that it is wetlands
8 which are scored under the County's rating system and it is the value of the score that
9 determines the appropriate buffer for the wetland. Thus, the use of the word "buffer" was a
10 clerical error of the Board.

11
12 **Conclusion:** As noted above, the Board finds that the use of the adjective "mature" within
13 the Board's articulation of WEAN's Reply Arguments for Issue 10 as well as the noun
14 "buffer" within the Board's discussion section were clerical errors. With this Order, the
15 Board deletes "mature" in the two locations noted by WEAN on Page 60, deletes "not" in a
16 single location on Page 64, and replaces "buffer" with "wetlands" in a single location on
17 Page 67 of the November 17, 2008 FDO.

18
19
20 The FDO at 60 is amended to state:

21 WEAN disputes the County's claim that its regulations allow buffers for
22 forested wetlands to be increased by referencing Exhibit R-9789, and argues it
23 is impossible to tell from this exhibit which wetlands are forested wetlands.

24 The FDO at 64 is amended to state:

25 While the County's Ordinance as discussed *infra* does not provide for fencing,
26 the Board finds that providing buffers and fencing to assure the protection of
27 the wetland habitat from household cats is not practical and not a clearly
28 erroneous violation of RCW 36.70A.172.

29 The FDO at 67 is amended to state:

30
31 In the County's rating system, all wetlands that receive scores requiring a
32 buffer to protect habitat receive a buffer of at least 75 feet or as much as 300

1 feet, in line with *Volume 2*'s observation that studies have shown buffers of at
2 least 76 feet are needed to protect forested wetlands from blowdowns.

3 **2. Misinterpretation of Facts**

4 WEAN asserts that the FDO is based, in large part, on Ecology's approval of Island
5 County's allowance for a reduction in buffers based on the intensity of residential
6 development. WEAN sets forth a single quotation from the FDO to demonstrate this,
7 which stated:³⁷

8
9
10 ...Ecology's statement that the County's buffer widths are adequate to protect
11 for impacts of water quality from stormwater and herbicides and pesticides,
12 and the impracticality of providing buffers that assure wetlands will be
13 protected from pets...

14 WEAN contends this misinterprets the facts because Ecology, as *amicus* in this matter, did
15 not address Issue 10. WEAN further argues that Ecology considers residential
16 development as a type a moderate land use intensity and recommends measures in excess
17 of those provided under ICC 17.02A. Lastly, WEAN states that the County's buffer
18 reduction provisions do not comport with Ecology's BAS guidance by failing to require any
19 of Ecology's recommended methods for reduction of intensity.
20

21 In response, the County notes that the Board's discussion of the position of the *Amici* is
22 accurate and that the *Amici* support the County's method for establishing wetland buffers.³⁸
23

24 **Board Discussion**

25 Upon reconsideration, WEAN disputes only a single portion of the Board's FDO in regards
26 to Issue 10, the discussion related to *Inadequate Buffers to Mitigate Pets, Herbicides and*
27 *Pesticides* and ICC 17.02A.090D.3.³⁹ Although WEAN is correct in that *Amici* did not
28 address WEAN's Issue 10 directly, *Amici* did submit briefing in relationship to Island
29
30

31 ³⁷ WEAN Motion, at 8 (Citing to Nov. 17, 2008 FDO, at 65).

32 ³⁸ County Response, at 5-6.

³⁹ Nov. 17, 2008 FDO, at 64.

1 County's wetland buffer system and habitat and water quality functions. The section of the
2 FDO cited by WEAN was addressing both the arguments of the other petitioner, Camano
3 Action for a Rural Environment (CARE), in relationship to CARE's Issue 7 which *Amici* did
4 respond to, and WEAN's assertions. The Board considered these statements when
5 addressing WEAN's claims that the County was not providing adequate buffers since they
6 addressed subject matter similar to CARE's assertions.
7

8 The Board also notes that WEAN references Appendix 8-D and a related Table, Table 8D-3,
9 in its motion. Appendix 8-D provides guidance for wetland buffers in Eastern Washington
10 and is therefore inapplicable to counties on the western side of the state. This is plainly an
11 error on the part of WEAN as all previous arguments were supported by Appendix 8-C
12 which provides guidance for wetland buffers in Western Washington. The Board will apply
13 the appropriate appendix.
14

15
16 WEAN contends that Ecology considers residential development of less than one dwelling
17 unit per acre as having a moderate level of impact and Ecology does not consider any level
18 of residential development as having a low level of impact. Both *Volume 1* and *Volume 2*
19 speak to the science behind buffer widths as they relate to the intensity of adjacent land
20 use. Although no specific numerical definition of land intensity is provided in *Volume 1*,
21 studies conducted by Shisler, et al. (1987) and Desbonnet, et al. (1994) differentiated
22 between land use impacts, classifying low intensity land use as agricultural, recreational,
23 and low-density housing and high intensity land use as high-density residential, commercial,
24 and industrial.⁴⁰ These findings are reflected later in *Volume 1* when buffer widths are
25 recommended based on habitat value and land intensity, with minimal habitat and low-
26 intensity use requiring 25 to 75 foot buffers, moderate habitat and moderate/high-intensity
27 requiring 75 to 150 foot buffers, and high habitat and any intensity use requiring 150 to 300
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⁴⁰ *Volume 1*, at 5-44, 5-48.
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1 foot buffers.⁴¹ With the exception of Table 8C-3 in *Volume 2*, WEAN points to no other
2 numerical definition as to intensity, nor could the Board find any reference in either volume
3 of Ecology's documents, including the Glossary. Thus, although the recommendations in
4 *Volume 2* do not consider any type of residential development as low-intensity, science in
5 *Volume 1* does, in fact, classify low-density residential as a low intensity land use and Island
6 County's decision to include residential use is not clearly erroneous given *Volume 1's*
7 findings.
8

9
10 As for measures recommended by Ecology to minimize impacts, the Board reminds WEAN
11 that *Volume 2* is Ecology's guidance and recommendations based on the synthesis of
12 science presented in Ecology's *Wetlands in Washington Volume 1*. This is clearly stated in
13 *Volume 2*:

14
15 The guidance presented in *Volume 2* is *advisory only*. Local governments are
16 not required to use this guidance. *The guidance in and of itself is not "best*
17 *available science."* Rather, *it represents the recommendations* of the
18 departments of Ecology and Fish and Wildlife as to how a local government
19 could include the best available science in policies, plans, and regulations to
protect wetlands.⁴²

20 This is not to say that *Volume 2* does not provide persuasive argument as to methods Island
21 County might adopt to protect wetlands but the listing of a measure within *Volume 2* does
22 not transform the measures from a recommendation to a mandate which the County was
23 required to implement pursuant to the GMA.
24

25 In addition, the ICC 17.02A.090.D.3 permits a buffer to be sized based on the intensity of
26 the residential use determined by both the percentage of impervious surface and cleared
27 area. From this base, property owners are required to follow the standards set forth in ICC
28 17.02A.090.D.3(b) which include limitations on structural setbacks, exterior lighting,
29
30

31
32 ⁴¹ *Volume 1*, at 5-51; see also, *Volume 2*, at 3-10.

⁴² *Volume 2*, at 1-2 (Emphasis added)

1 landscape chemicals, and stormwater. The application of these standards does not allow
2 for a reduction in the wetland buffer but rather they seek to ensure the use will not adversely
3 impact the established wetland or its buffer.

4
5 WEAN is reminded that the purpose of a buffer is to protect the wetland. ICC 17.02A.090.F
6 sets buffer widths for low intensity land uses based on the type of wetland and habitat, with
7 buffers ranging from 20 feet to 150 feet. *Volume 1* provides a summary of studies
8 conducted in regards to buffer width and nutrient removal, such as nitrogen and phosphorus
9 from fertilizers. Although these studies revealed buffers as wide as 850 feet,⁴³ the studies
10 also showed buffers as narrow as 15 feet were capable of removing nutrients with many
11 studies indicating effective nutrient removal in the 20 to 40 foot range.⁴⁴ WEAN notes that
12 Ecology's recommendations suggest limiting the use of pesticides within 150 feet of a
13 wetland. *Volume 1* provides, in regards to pesticides, that there is a significant data gap in
14 regards to a buffer's ability to remove toxins but that the effectiveness of toxin removal is
15 due primarily to the absorption of toxins by sediment particles.⁴⁵ Of six studies noted, only
16 Neary et al. (1993) quantified the buffer width, stating that a buffer of 49 feet or greater is
17 effective in minimizing contamination by pesticide residue while also noting that
18 concentrations of pesticides in water only occurred when no buffer was present or when
19 pesticides were applied within the buffer.⁴⁶

20
21
22
23 Lastly, the Board does not dispute the evidence submitted which demonstrates the
24 predatory nature of domestic pets and their impacts on all types of wildlife, no matter where
25 that wildlife lives. However, with the exception of requiring all pet owners residing adjacent
26 to a wetland to restrain their pets at all times, a requirement which would be nearly
27 impossible to enforce, the Board does not believe that the width of a buffer would deter the
28

29
30
31 ⁴³ This width was in relationship to the removal of nutrients, solids, and BOD from feedlot runoff.

32 ⁴⁴ *Volume 1*, Table 5-2

⁴⁵ *Volume 1*, Section 5.5.3.3

⁴⁶ *Volume 1*, Section 5.5.3.3

1 intrusion of unrestrained domestic pets into wetland areas, as they are known to roam miles
2 from their owner's homes, nor would dense vegetation or a fence preclude their movement,
3 especially cats.⁴⁷
4

5 **Conclusion:** The Board finds no error within the FDO's discussion regarding Ecology's
6 support of Island County's wetland program in relationship to land use intensity. This
7 discussion section reflected argument submitted by Ecology in relationship to CARE's Issue
8 7 and applied equally to WEAN's assertion that the County's buffer widths for low intensity
9 land uses were inadequate. The Board also finds no misinterpretation of fact regarding
10 residential development qualifying as a low intensity land use as such a determination is
11 supported by science presented in *Volume 1*. In addition, the Board finds no
12 misinterpretation of fact in regards to the measures recommended by Ecology regarding
13 minimization of impacts.
14
15

16 ORDER

17 Having reviewed WEAN's Motion for Reconsideration, the responses filed in regard to this
18 Motion, the Board's November 17, 2008 Final Decision and Order and the related Record,
19 and the relevant provisions of the GMA and the Board's Rules of Practice and Procedure,
20 the Board finds:
21

- 22 1. WEAN failed to demonstrate that the Board misinterpreted the law in regards to
23 Issue 1. WEAN's Motion for the Board to revise its FDO and require the County to
24 undertake landscaped-scale considerations within 180 days is DENIED.
- 25 2. WEAN failed to demonstrate that the Board misinterpreted the facts in regards to
26 Issue 8. WEAN's Motion for the Board to invalidate or remand Ordinance C-63-08
27 in relationship to land use intensity and wetland exemptions is DENIED.
28
29

30 ⁴⁷ Restraining cats would amount to requiring pets owners to maintain "indoor-only" cats or to leash and
31 supervise an outdoor cat as even a solid wood fence would not contain a cat. Restraining dogs would require
32 them to be leashed, even while on private property, or to otherwise limits their movement, via a fence or
kennel. The Board questions the viability of even dense vegetation from curbing the movement of animals.

- 1 3. WEAN failed to demonstrate that the Board misinterpreted the facts in regards to
2 the Pantier Thesis as it related to Issue 9. WEAN's Motion for the Board to delete
3 Footnote 111 is DENIED but CLARIFIED by this Order.
4 4. WEAN failed to demonstrate that the Board misinterpreted the facts regarding the
5 diameter utilized to identify mature forested wetlands as provided in Issue 9.
6 WEAN's Motion for the Board to find the definition of Mature Forested Wetland
7 non-compliant and remand Ordinance C-63-08 is DENIED.
8 5. WEAN demonstrated that the Board's FDO contained clerical errors in regards to
9 Issue 10. The Board GRANTS WEAN's Motion and CORRECTS these errors as
10 provided in this Order.
11 6. WEAN failed to demonstrate that the Board misinterpreted the facts in regards to
12 land use intensity as provided in Issue 10. WEAN's Motion for the Board to
13 invalidate or remand Ordinance C-63-08 is DENIED.
14
15

16 SO ORDERED this 22nd day of December 2008.
17
18
19

20 _____
21 Holly Gadbow, Board Member
22

23 _____
24 James McNamara, Board Member
25

26 _____
27 William Roehl, Board Member
28

29 Pursuant to RCW 36.70A.300 this is a final order of the Board.

30 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
31 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
32

1 judicial review may be instituted by filing a petition in superior court according to the
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

3 **Enforcement.** The petition for judicial review of this Order shall be filed with the
4 appropriate court and served on the Board, the Office of the Attorney General, and all
5 parties within thirty days after service of the final order, as provided in RCW
6 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
7 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

8 **Service.** This Order was served on you the day it was deposited in the United States
9 mail. RCW 34.05.010(19).
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